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Notes

THE AMBUSH INTERVIEW: A FALSE LIGHT INVASION OF PRIVACY?

The "ambush" interview is a controversial investigative reporting technique permeating both national and local television news programming. In the typical ambush interview, a reporter and his news crew intercept an unsuspecting newsworthy subject on the street and bombard him with incriminating accusations ostensibly framed as questions. The ambush interviewee inevitably appears guilty before the viewing audience. This is due to a variety of factors, including the subject's severe credibility disadvantage and the accusatory nature of the reporter's questions. This Note applies a false light invasion of privacy analysis to the ambush technique and examines the nexus between the technique and the goals of first amendment freedom of the press. It concludes that the ambush interview inherently creates false light invasions of privacy and is contrary to the fundamental goals of freedom of the press.

INTRODUCTION

On MAY 22, 1979, an anonymous tipster telephoned WCBS-TV in New York City.¹ The tipster spoke to Arnold Diaz, an investigative reporter for the station, and told him about a vacant lot where chemicals had been illegally dumped.² Diaz hurried to the scene and found drums of chemical waste strewn about.³ While examining the barrels, he noticed an adjacent plant operated by Flexcraft Industries, a manufacturer of adhesives and coatings.⁴ Diaz promptly set off for the plant to investigate further, accompanied by a cameraman, a lighting man, and a soundman.⁵ With camera rolling, they encountered the plant "manager".⁶

MANAGER: "Get that damn camera out of here."

DIAZ: "Sir . . . Sir . . ."

MANAGER: "I don't want to be involved with you people. . . ."

1. *Machleder v. Diaz*, 538 F. Supp. 1364, 1367 (S.D.N.Y. 1982) (order denying motions for summary judgment).

2. *Id.* WCBS had assigned Diaz to investigate illegal dumping of chemical wastes. Complaint at 3, *Machleder*.

3. 538 F. Supp. at 1367.

4. *Id.*

5. See Complaint at 5. Typically, in television news each reporter is accompanied by three technicians: a cameraman, a lighting man, and a soundman. Daley, "We Deal With Emotional Facts," N.Y. Times, Dec. 15, 1974, (Magazine), at 18, 19.

6. 538 F. Supp. at 1368. Irving Machleder, the owner of Flexcraft, was the "manager" encountered by Diaz and his crew. *Id.* at 1367.

DIAZ: "Just tell me why—why are those chemicals dumped in the back. . . ."

MANAGER: "I don't want . . . I don't need . . . I don't need any publicity."

DIAZ: "Why are the chemicals dumped in the back?"

MANAGER: "We don't . . . we didn't dump'em."⁷

The interview appeared on that evening's news⁸—even though, as acknowledged in the broadcast, Flexcraft officials actually had reported the dumping, had denied responsibility for the dumping, and did not own the adjacent lot.⁹ Flexcraft and its owner, Irving Machleder,¹⁰ are suing CBS for false light invasion of privacy, charging that the reporter's "accusatory questions . . . were phrased and delivered in a manner so as to imply that the plaintiffs were guilty of the illegal dumping."¹¹ They claim that CBS "publicized [Machleder] in a false light by inducing his anger and then portraying him as intemperate and evasive, thereby implying he was responsible for the chemical dumping."¹² The false light claim has withstood a motion for summary judgment.¹³

Diaz's interview with Machleder represents a controversial investigative technique labeled by media critics as the "ambush" interview.¹⁴ "[A]s pervasive as it is questionable,"¹⁵ the ambush interview has been defined by *Los Angeles Times* media critic David Shaw as an interview in which "a reporter—with a camera crew in tow—pounces on an unsuspecting subject and begins bombarding him with accusatory (and, under the circumstances, often unanswerable) questions."¹⁶ After the ambush technique

7. *Id.* at 1368.

8. *Id.*

9. *Id.* at 1369.

10. See *supra* note 6.

11. Complaint at 5. See generally Carley, *As TV News Reporting Gets More Aggressive, It Draws More Suits*, Wall St. J., Jan. 21, 1983, at 1, col. 1 (detailing a number of television reporting tactics which have produced litigation).

12. 538 F. Supp. at 1374.

13. *Id.* at 1375.

14. See Shaw, *The Trouble With TV Muckraking*, TV GUIDE, Oct. 10, 1981, at 6, 7; Carley, *supra* note 11, at 12; Shales, *Journalism By the Jugular—TV News' Ambush Interview: Pounce Now, Package Later*, Wash. Post, Apr. 26, 1981, at H1, col. 5; Schwartz, *The Ethics Question in TV Investigative Reporting*, N.Y. Times, Apr. 23, 1981, at 20, col. 3. See generally S. LESHNER, MEDIA UNBOUND: THE IMPACT OF TELEVISION JOURNALISM ON THE PUBLIC 151-54 (1982) (describing dramatic journalism techniques of Geraldo Rivera, reporter for ABC's "20/20" program).

15. Shaw, *supra* note 14, at 7.

16. *Id.*; see also Carley, *supra* note 11, at 12, col. 4 (ambush interviewing expected to continue until fascination with it wanes); Shales, *supra* note 14, at H1, col. 6 (ambush technique results in harassment of innocent as well as guilty); Schwartz, *supra* note 14, at 20,

was introduced by network reporters, including Mike Wallace and Geraldo Rivera,¹⁷ it became widely emulated by investigative teams at local television stations.¹⁸ Although the technique may enhance viewer ratings¹⁹ and the prestige of the reporters who em-

cols. 3-4 (the negative and dramatic consequences of the ambush interview may be justified in certain situations).

17. See, e.g., S. LESHNER, *supra* note 14, at 151-54; Shaw, *supra* note 14, at 7; *The Strange Case of Geraldo Rivera*, TV GUIDE, Dec. 6, 1980, at 21, 24; Carley, *supra* note 11, at 12, col. 5; Shales, *supra* note 14, at H1, cols. 5-6; Schwartz, *supra* note 14, at 20, cols. 3-5.

18. See, e.g., Kowet, *Local TV Exposés: Are They Stalking Corruption for Show—Or Substance?*, TV GUIDE, Mar. 29, 1980, at 5-6; Shaw, *supra* note 14, at 6-7.

Le Mistral, Inc. v. CBS, 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978), is an excellent example of a local news crew's use of the ambush technique. The crew was investigating New York City restaurants that had been cited for health code violations. The station, WCBS—the same station that broadcast the Flexcraft interview—had instructed the crew “to avoid seeking an appointment or permission to enter” any of the restaurants under investigation. *Id.* at 493 n.1, 402 N.Y.S.2d at 816 n.1. Instead, the crew was “to enter unannounced catching the occupants by surprise,” and to do so “with cameras rolling.” *Id.* The brisk entrance of the news crew into the plaintiff restaurant produced consternation among the patrons, especially when, responding to the loud orders of the reporter, the crew focused their lights and camera on the dining room. “Patrons waiting to be seated left the restaurant. Others who had finished eating left without waiting for their checks. Still others hid their faces behind napkins or table cloths or hid themselves beneath tables.” *Id.* By this time the owner had emerged from the kitchen. He declined to be interviewed and, as the filming continued, forced the reporter and her crew out of the restaurant. The restaurant sued for trespass; neither a defamation nor an invasion of privacy claim was advanced. CBS argued that its news crew, in entering the restaurant with their camera rolling, was motivated solely by a desire “to solicit the views of those in charge of the restaurant” regarding the health code citation. Brief for Appellant at 23, *Le Mistral*.

It remains unclear, however, how the unannounced entry and subsequent activities of the news crew would enable them more effectively to “solicit the views of those in charge of the restaurant.” CBS argued that “the differences between print and broadcast media justify different techniques.” *Id.* at 44. Indeed, a newspaper reporter would merely have to telephone the restaurant to solicit the views of the management. But television is a visual medium; from the perspective of a TV news director, “[i]f it didn't happen on film, it almost didn't happen.” Daley, *supra* note 5, at 48. Thus, it would be improper to demand that broadcast journalists adopt methods appropriate to newspaper journalism. Brief for Appellant at 44, *Le Mistral*. But the station's need for pictures does not explain why a surprise entrance was necessary, or why the crew was instructed to avoid seeking an appointment or permission to enter any of the restaurants. For a complete description of the facts surrounding *Le Mistral*, as well as a transcript of the WCBS broadcast, see N.Y.L.J., Apr. 8, 1976, at 7, col. 3. See generally Watkins, *Private Property vs. Reporter Rights—A Problem in Newsgathering*, 54 JOURNALISM Q. 690 (1977) (discussing *Le Mistral* and arguing for a limited constitutional privilege for reporters to trespass in order to gain access to “newsworthy events and information”); *Survey of New York Practice*, 52 ST. JOHN'S L. REV. 594, 670-75 (1978) (detailed analysis of *Le Mistral*).

19. To “maximize their ratings,” local television stations seek to differentiate themselves from their competitors. Litman, *Market Share Instability in Local Television News*, 24 J. BROADCASTING 499, 503-04 (1980). Viable means of differentiation are limited to the “style of reporting and the on-air personalities.” *Id.* Thus, there is pressure to employ a drama-producing technique like the ambush interview—it not only creates a distinctive style of reporting, but also causes viewers to focus on the individual reporter. Cf. Shaw,

ploy it,²⁰ the consensus among media critics is that the ambush interview has a powerful tendency to make its subjects look guilty.²¹ Even Mike Wallace seems eager to disassociate himself

supra note 14, at 7 (when ratings sweep period draws near, news director "is likely to press his reporter to be quicker, flashier, more sensational."); *Special Report—Local TV Journalism: 1979*, BROADCASTING, Aug. 6, 1979, at 35, 35 (news director at Chicago station explained that investigative reporting "used to be a luxury or a rarity; now it's required."); Schwartz, *supra* note 14, at 20, col. 4 (describing pressure on local stations to air "attention-getting investigative reports" to enhance their ratings). Studies have confirmed that sensationalism does boost ratings. See, e.g., Ryu, *Public Affairs and Sensationalism in Local TV News Programs*, 59 JOURNALISM Q. 74 (1982). The same is true at the network level. For example, a former "60 Minutes" staffer has disclosed that the confrontational style was even used, albeit reluctantly, by correspondents and producers who felt uncomfortable with it—all for the sake of preserving ratings. The staffer stated: "I know several ['60 Minutes'] producers who have, against their better nature, gone out and done confrontation things—taken a correspondent up to a building they knew he couldn't get into, and the like—simply because they knew that's what was wanted." Stein, *How "60 Minutes" Makes News*, N.Y. Times, May 6, 1979, (Magazine), at 28, 84.

20. Washington Post media critic Tom Shales calls the ambush interview a technique "that may have less to do with getting the story than with turning TV reporters into stars and heroes." Shales, *supra* note 14, at H1, cols. 5-6; see also Shaw, *supra* note 14, at 7 (investigative reporter will seek "dramatic confrontation" to "enhance his image.").

The ambush interview was instrumental in Geraldo Rivera's climb to fame. In 1972, while struggling for recognition at a local New York City station, Rivera was assigned to report about deplorable conditions at a state hospital for the mentally retarded. "The hospital was called Willowbrook, and the story was not new. But Rivera brought something new to it: he went inside, camera rolling. By the time the story subsided, months later, Rivera's name and face were known to millions of people." *The Strange Case of Geraldo Rivera*, *supra* note 17, at 24.

Journalism has grown increasingly competitive in recent years. "To many young reporters, it seems as if there is only one way to break out of the pack: to hit, as *Los Angeles Times* media critic David Shaw puts it, 'a grand-slam home run.'" *A Searching of Conscience*, NEWSWEEK, May 4, 1981, at 50, 55. Thus, there is a strong temptation to resort to sensationalism as a means of gaining recognition. *Jugular Journalism?*, NEWSWEEK, May 10, 1976, at 79, 79; see Scali, *How Much Investigation?*, TELEVISION Q., May-July 1976, at 31, 32; *Uneasy Press Sets Out to Refurbish Its Image*, U.S. NEWS & WORLD REP., June 29, 1981, at 71, 72; Shales, *supra* note 14, at H5, col. 2.

21. Letter to the author from Louis D. Giannetti, Film Professor, Case Western Reserve University (Feb. 10, 1983) (on file with the *Case Western Reserve Law Review*) [hereinafter cited as Giannetti Letter]; letter to the author from Dr. Rose K. Goldsen, Sociology Professor, Cornell University (Feb. 14, 1983) (on file with the *Case Western Reserve Law Review*) [hereinafter cited as Goldsen Letter]; see also Shaw, *supra* note 14, at 7 ("Even if the subject [of an ambush interview] is innocent, he is bound to look uneasy—guilty!—on camera."); Kerr, *Cronkite Views "60 Minutes"*, N.Y. Times, Nov. 26, 1983, at 15, col. 3 (according to Walter Cronkite, the ambush technique "would make almost anybody look guilty. Under hot lights, perspiring, the slightest eye movement appears to be furtive."); Shales, *supra* note 14, at H1, col. 6 ("We all feel in our hearts that nothing pleases Mike Wallace . . . so much as when he and a '60 Minutes' crew get chased out of a suspect's office or have a door dramatically slammed in their faces. . . . [I]n the visual vocabulary of 'investigative' TV sleuthing, slamming a door is tantamount to an admission of guilt."); *id.* at H4, col. 5 (Fred W. Friendly former president of CBS News, describes the ambush interview as "the dirtiest trick department of broadcast journalism. . . . The picture transmitted in our heads, the viewers' heads, is of the honest reporter asking the honest

from the technique, now advocating it "only as a last resort."²² "If you're after light rather than heat," he says, "there's not much point to it."²³

This Note examines the ambush interview from both a privacy²⁴ and a first amendment²⁵ perspective. It concludes that the ambush technique not only inherently creates false light invasions of privacy,²⁶ but also is incompatible with the constitutional functions of the press.²⁷

I. THE AMBUSH INTERVIEW AS A FALSE LIGHT INVASION OF PRIVACY

With the *Machleder* case pending,²⁸ no precedent yet exists for a false light claim by an ambush interviewee. This section of the Note sets forth the elements of a false light claim²⁹ and illustrates their application to the ambush interview.³⁰

A. Elements of a False Light Claim

According to the *Restatement (Second) of Torts*, "[o]ne who gives another publicity which places him before the public in a false light of a kind highly offensive to a reasonable man, is subject to liability to the other for an invasion of his privacy."³¹ Thus, a false light claimant must prove (1) the wide publication (2) of a falsity (3) that would be objectionable to a reasonable person under the circumstances.³² The Supreme Court imposed an additional requirement in *Time, Inc. v. Hill*,³³ extending the

question and the . . . interviewee [as being] crooked . . . when exactly the opposite could be the case.'"); Schwartz, *supra* note 14, at 20, col. 4 (according to Roone Arledge, president of ABC News, "there's an implied guilt when you have a crusading reporter chasing after a subject who won't talk to him.").

22. Carley, *supra* note 11, at 12, col. 5.

23. *Id.*; see Schwartz, *supra* note 14, at 20, col. 5 (Wallace has described the ambush interview as "a self-conscious device." "If someone refuses to talk on camera, we try sending a letter. If they still refuse, we say so on the air.").

24. See *infra* notes 40-130 & 150-60 and accompanying text.

25. See *infra* notes 161-205 and accompanying text.

26. See *infra* notes 118-23 and accompanying text.

27. See *infra* notes 203-05 and accompanying text.

28. The case will come to trial in the summer of 1984.

29. See *infra* notes 31-36 and accompanying text.

30. See *infra* notes 41-130 and accompanying text.

31. RESTATEMENT (SECOND) OF TORTS § 652E (1979); see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 812-14 (4th ed. 1971).

32. The publication need not be defamatory to constitute a false light invasion of privacy. W. PROSSER, *supra* note 31, at 813.

33. 385 U.S. 374 (1967).

"*Times* malice" standard of *New York Times Co. v. Sullivan*³⁴ to false light cases. The *Hill* Court held that in false light cases involving the publication of matters of public concern, the plaintiff must prove that the defendant knew it was portraying the subject in a false light, or acted with reckless disregard of the possibility.³⁵ The plaintiff in *Cantrell v. Forest City Publishing Co.*³⁶ successfully established the requisite *Times* malice. In *Cantrell*, false light was found in an exaggerated portrayal of a family's hardship after the father's death. The Court held that the reporter "must have known" of the falsities in his report and therefore knowingly or recklessly portrayed the family in a false light.³⁷

Truth is an absolute defense in false light cases.³⁸ Moreover, in the ambush interview it is arguable that the subject, by attempting to answer the reporter's "questions," consents to the interview and thus waives his right to privacy.³⁹

B. *Establishing the False Light Claim*

The argument that the ambush interview is a false light invasion of privacy is based upon the premise that the reporter's "question" is really an accusation which, by inducing an angry or evasive response, creates the impression that the subject is guilty.⁴⁰

34. 376 U.S. 254, 279-80 (1964). *Sullivan* was a libel case brought by a public official. The Court held that there could be no recovery unless the alleged defamatory statement "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* This requirement is firmly grounded in first amendment philosophy. See *infra* notes 138-49 and accompanying text. By effectively granting the press a privilege to defame public officials, the *Times* malice standard seeks to avoid a chilling of the functions of the press by state libel law. Forcing "the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'" *Sullivan*, 376 U.S. at 279. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967), the Court extended *Times* malice to libel claims brought by *public figures*—individuals who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." The states are free to require a showing lesser than *Times* malice in libel cases brought by private individuals. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

35. 385 U.S. at 387-88. Articulating the first amendment justification for the holding, the Court stated: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press." *Id.* at 388.

36. 419 U.S. 245 (1974).

37. *Id.* at 253. The Court left open the question of whether the distinction between public and private individuals espoused in *Butts* and *Gertz* would be extended to false light cases. *Id.* at 250-51.

38. See RESTATEMENT (SECOND) OF TORTS § 652E comment a (1979).

39. See W. PROSSER, *supra* note 31, at 817.

40. See *supra* notes 11-12 and accompanying text.

If the subject is not guilty of the accusation, he has been shown in a false light. Showing that the falsity was widely publicized and offensive to a reasonable person is comparatively easy; establishing implied guilt and *Times* malice is a more complicated task.

1. *Publication*

The ambush interview easily satisfies the publicity requirement. If the interview was broadcast on a television news show it was probably seen by thousands, perhaps millions, of viewers.⁴¹

2. *Objectionable to a Reasonable Person*

The subject of an ambush interview tends to be confronted with serious accusations. Thus, a reasonable person would likely find it highly offensive if the accusations prove to be unfounded. The ambush interview invariably seems to confront its subjects with charges of *criminal* wrongdoing. For example, in the Flexcraft interview, Irving Machleder was questioned about illegal dumping of hazardous chemical wastes.⁴² Similarly, during a well-known ambush interview broadcast on ABC's "20/20," Gerardo Rivera stopped a subject on the street and asked him to explain charges that he was involved in an "arson for profit" business.⁴³ A number of false light claims have resulted where the subject was somehow linked with a group of convicted criminals even though he had never been convicted of any crime.⁴⁴ It therefore seems arguable that a reasonable person would find it highly offensive where an interview subject is falsely identified with criminal activity. In *Machleder*, the district court found that such a

41. "Seven out of ten people now get their information about the world exclusively from TV." D. CROSS, *MEDIASPEAK* 68 (1983). Moreover, the public considers television news more credible than newspapers. See, e.g., Abel & Wirth, *Newspaper vs. TV Credibility for Local News*, 54 JOURNALISM Q. 371 (1977); Lee, *Credibility of Newspaper and TV News*, 55 JOURNALISM Q. 282 (1978); Reagan & Zenaty, *Local News Credibility: Newspapers vs. TV Revisited*, 56 JOURNALISM Q. 168 (1979); Wilson & Howard, *Public Perception of Media Accuracy*, 55 JOURNALISM Q. 73 (1978).

42. 538 F. Supp. at 1367, 1368.

43. Transcript at 15, ABC News, "20/20": "Arson and Profit," broadcast Feb. 7, 1980; see S. LESHNER, *supra* note 14, at 153; Shales, *supra* note 14, at H4, col. 5. See generally *A Flap Over TV's "20/20"*, NEWSWEEK, May 4, 1981, at 53 (detailing Chicago station's frontal attack on Rivera's technique and accuracy). In another well-known ambush interview, Rivera, while chasing his subject, accused him of being a "hit man." See *infra* note 59.

44. See, e.g., *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946); *Itzkovitch v. Whitaker*, 115 La. 469, 39 So. 499 (1905); *Downs v. Swann*, 111 Md. 53, 73 A. 653 (1909).

publication "cannot be deemed inoffensive as a matter of law,"⁴⁵ and ultimately denied CBS's motion for summary judgment.⁴⁶

3. *Imputation of Guilt*

The most important element of the false light claim is proving that the ambush interview technique makes its subject look guilty. In determining whether a subject "looks" guilty, it is not enough merely to examine a transcript of the interview; "[v]ideo is a language made up of much more than words."⁴⁷ American television viewers have learned to interpret the sounds and images of a broadcast⁴⁸—they have learned a "visual vocabulary"⁴⁹ which may contribute as much to the meaning of a television show as the dialogue.⁵⁰ Indeed, the ultimate meaning of a television broadcast is derived not from words, but from "[t]he picture transmitted in our heads."⁵¹

Courts have recognized this. In *Machleder*, the district court noted that a "dry transcript" failed to reveal how agitated the subject became when approached by the news crew.⁵² Moreover, in a recent false light action against ABC and Geraldo Rivera,⁵³ the district judge instructed the jury to "consider the *message* of the entire broadcast, as well as the actual words used by defendants, in determining whether plaintiff was depicted falsely in the broadcast."⁵⁴

45. 538 F. Supp. at 1375.

46. *Id.*

47. Goldsen Letter, *supra* note 21, at 1.

48. *Id.* See generally R. GOLDSSEN, *THE SHOW AND TELL MACHINE* (1975) (critical analysis of television and its profound effects on viewing public).

49. Shales, *supra* note 14, at H1, col. 6.

50. Goldsen Letter, *supra* note 21, at 1.

51. Shales, *supra* note 14, at H4, col. 5 (quoting Fred W. Friendly, former president of CBS News); cf. R. FRANK, *MESSAGE DIMENSIONS OF TELEVISION NEWS* 43 (1973) (through different strategies of filming, a candidate can be projected as either warm and intimate or cold and distant; close-ups promote the former image, while the latter may be achieved by photographing the candidate from a distance); Frank, *The "Grammar of Film" in Television News*, 51 JOURNALISM Q. 245 (1974) (film technique itself plays role in shaping perceptions of people in news); Mandell & Shaw, *Judging People in the News—Unconsciously: Effect of Camera Angle and Bodily Activity*, 17 J. BROADCASTING 353, 353 (1973) ("viewers are significantly—and unconsciously—influenced 'favorably' by visuals in which a person is photographed from [an imperceptibly] low angle and/or in which the person photographed engages in some kind of activity rather than just being passively photographed.").

52. 538 F. Supp. at 1369.

53. *Boddie v. ABC*, No. 80-675A (N.D. Ohio verdict May 10, 1982), *appeal docketed*, No. 82-3420 (6th Cir. July 2, 1982).

54. Transcript, vol. 14, at 15, *Boddie* (emphasis added). See generally Drexler, *Jour-*

a. *The Reporter's Questions as Accusations.* In the ambush situation, the reporter ostensibly conducts an interview. His statements to the subject are indeed phrased as questions, but they have an accusatory thrust.⁵⁵ Though merely interrogatories in the transcript, the reporter's words have a more affirmative impact upon viewers.⁵⁶ The potency of these "questions" is often bolstered by the manner in which the reporter leads up to the encounter.⁵⁷ The "guilt" of the interviewee usually is asserted, detailed, and documented in advance.⁵⁸ Viewers see him for the first time when the reporter confronts him on the street and asks point blank if he is guilty. In such a context, the reporter's question becomes an accusation.⁵⁹ The subject is brought in solely to

nalistic Ethics on Trial, Cleveland Plain Dealer, June 27, 1982 (Magazine), at 6 (detailing the Boddie facts).

55. *Machleder*, 538 F. Supp. at 1373; Complaint at 5, *Machleder*; S. LESHER, *supra* note 14, at 151-52; Shaw, *supra* note 14, at 7; Carley, *supra* note 11, at 12, col. 4. Dan Rather, in describing how a confrontation interview is conducted, has openly conceded that the subject is presented with accusations. See Transcript at 11, CBS News Special, "Eye on the Media: Business and the Press," broadcast Dec. 25, 1982.

56. Goldsen Letter, *supra* note 21, at 3.

57. *Id.*

58. *Id.*; see, e.g., Transcript at 6-15, ABC News, "20/20": "Arson and Profit," broadcast Feb. 7, 1980 (before interviewing several men allegedly involved in "arson for profit" scheme, Geraldo Rivera presented evidence of their guilt); Transcript at 8-9, ABC News, "20/20": "Injustice for All," broadcast Apr. 17, 1980 (Rivera offered evidence of guilt of alleged "hit man" prior to interview); cf. Becker, Sobowale & Casey, *Newspaper and Television Dependencies: Effects on Evaluations of Public Officials*, 23 J. BROADCASTING 465, 465-66 (1979) (viewers receiving most of their news from television generally tend to adopt negative assessment of public officials); Sohn, *Determining Guilt or Innocence of Accused from Pretrial News Stories*, 53 JOURNALISM Q. 100, 105 (1975) (some newspaper readers assume guilt of suspect upon learning charge; this tendency is more pronounced with serious crimes).

59. Goldsen Letter, *supra* note 21, at 3. In some ambush interviews, the accusatory quality of the reporter's questions is obvious. In a report for the ABC News program "20/20," Geraldo Rivera was investigating an Akron, Ohio judge accused of obtaining sexual favors from criminal defendants in exchange for lenient treatment. Rivera confronted a man suspected of working for the judge. The man was thought to have "silenced" five prostitutes who were threatening to inform the press of their encounters with the judge:

RIVERA: [C]ome over here . . . Did you hear that five witnesses gave you up as the hit man? Well, how do you feel about that? Do you feel betrayed?

WILLIAM 'BOBE' BROOKS: No, (BLIPPED) . . . don't know a thing . . .

[Rivera then informs Brooks that he is on camera.]

RIVERA: Better talk to me now, Bobe.

'BOBE': Get out of my (BLIPPED) face. Git outta my face!

RIVERA: No, better not. Don't get tough. Don't get tough cause you're not talking to five whores now, Bobe. You're the hit man, aren't you?

[Brooks turns and begins walking away. Rivera and his cameraman follow.]

RIVERA: You threatened those women that if they testified against the Judge you'd . . . you'd end them up in a ditch, didn't you?

deny an allegation already established as reasonable.⁶⁰ Any denial he may offer will be no match for the buildup preceding the "question."⁶¹

b. *Accusation Induces Evasive Response Which Undermines the Subject's Credibility.* By intercepting an unsuspecting subject and placing him on the defensive, the ambush interview deprives him of "a fair and reasonable opportunity to respond."⁶² The subject is given no opportunity to prepare,⁶³ "no opportunity to compose himself, to put his best foot forward—to speak up in the most convincing way."⁶⁴ Because the ambush subject suddenly finds himself being filmed without warning and asked embarrassing "questions," his natural tendency is to respond angrily and evasively.⁶⁵ By provoking⁶⁶ hostility, the ambush technique renders the subject unappealing to viewers;⁶⁷ by making him edgy and evasive, it also arouses their suspicion.⁶⁸

Studies have isolated four factors that are crucial to television news source credibility: "composure," "extroversion," "competence," and "character-sociability."⁶⁹ The ambush interviewee is arguably robbed of all these sources of credibility. In the atmosphere created by the ambush interview, the subject can hardly be expected to maintain his composure or sociability. He also tends to be extremely introverted, and his character and competence are explicitly being questioned.

[Brooks begins hurrying away now, but Rivera and his cameraman hurry after him.]

RIVERA: Five separate witnesses, all sayin' that you're the guy. That Judge Barbuto called you into his office . . . they're saying that Judge Barbuto called you into his office . . . that he gave you the names of those five prostitutes and he said, 'Talk to these women because they're talking some trash about me.' . . .

[Brooks breaks into a run, but Rivera and his cameraman keep pace behind him.]

RIVERA: Isn't that true, Bobe? Aren't you Judge Barbuto's hit man?

Transcript at 9–10, ABC News, "20/20": "Injustice for All," broadcast Apr. 17, 1980. For descriptions of and comments on the incident, see S. LESHNER, *supra* note 14, at 151–52; Shaw, *supra* note 14, at 7; Shales, *supra* note 14, at H1, col. 6.

60. Goldsen Letter, *supra* note 21, at 3.

61. *Id.*

62. Schwartz, *supra* note 14, at 20, col. 4.

63. Giannetti Letter, *supra* note 21.

64. Goldsen Letter, *supra* note 21, at 4.

65. Giannetti Letter, *supra* note 21; see *supra* text accompanying note 12.

66. See *infra* notes 158 & 179 and accompanying text.

67. Giannetti Letter, *supra* note 21.

68. See Shaw, *supra* note 14, at 7.

69. McCain, Chilberg & Wakshlag, *The Effect of Camera Angle on Source Credibility and Attraction*, 21 J. BROADCASTING 35, 37 (1977); McCroskey & Jenson, *Image of Mass Media News Sources*, 19 J. BROADCASTING 169, 173 (1975).

c. *The Effects of the Subject's Unfamiliarity with Cameras and Public Speaking Techniques*. Aside from a credibility disadvantage, the ambush subject suffers from unfamiliarity with television cameras and news production techniques.⁷⁰ The very presence of a television camera has an intimidating effect on people.⁷¹ One interviewing manual specifically instructs reporters to "[p]repare the interviewee if recorders, cameras, and lights will be used."⁷² Veteran reporters have found that interviewees are unlikely to be candid when a camera is present.⁷³ Moreover, the subject of an ambush interview may inadvertently convey a dishonest image through his ignorance of standard broadcasting techniques.⁷⁴

Articles⁷⁵ and books⁷⁶ are appearing which provide elaborate instruction to business people on how to conduct themselves during a television interview. This instruction includes tactics for dealing with hostile or leading questions, tips about makeup and wardrobe, and even technical information about the taping of studio interviews.⁷⁷ The very existence of these books and articles indicates the high level of preparation required to prevent oneself from being viewed unsympathetically on television. In addition, it is not enough to be knowledgeable about television and experienced at speaking before cameras. Even veteran CBS News cor-

70. Giannetti Letter, *supra* note 21. Bill Brown, one of the original producers of "60 Minutes," views the confrontation situation "as being so heavily weighted in favor of the reporters as to be intrinsically unfair." Stein, *supra* note 19, at 78. Elaborating on this point, Brown stated:

"[O]n one side you have professionals, people accustomed to dealing with cameras and the rest of the technical side of it; on the other is someone who might never have been close to a TV camera before. Then they get a tight shot of his face, and of course he doesn't look comfortable. He doesn't know about eye contact with the camera, so his eyes are shifting. And all the while Mike Wallace is talking to him—and Mike is a very imposing character."

Id.

71. C. STEWART & W. CASH, *INTERVIEWING: PRINCIPLES AND PRACTICES* 152 (3d ed. 1982); Giannetti Letter, *supra* note 21; see Balon, *Differential Effects of Three Media in a News-Gathering Situation*, 54 JOURNALISM Q. 498, 502 (1977) (experiments indicate that even under favorable circumstances, presence of television camera distorts responses and makes interviewees "phony and extremely cooperative").

72. C. STEWART & W. CASH, *supra* note 71, at 146.

73. See J. BRADY, *THE CRAFT OF INTERVIEWING* 90-91 (1976).

74. A classic example is the need to maintain eye contact with the camera. See J. HILTON & M. KNOBLAUCH, *ON TELEVISION! A SURVIVAL GUIDE FOR MEDIA INTERVIEWS* 17 (1980) ("[T]he camera and the microphone are not always accurate. That sweaty, shifty-eyed person being interviewed may not be a lying scoundrel, only a poor soul unschooled in television . . .").

75. See, e.g., Klepper, *A TV Interview Need Not Be a Lynching*, Wall St. J., Dec. 28, 1981, at 8, col. 3.

76. See, e.g., J. HILTON & M. KNOBLAUCH, *supra* note 74.

77. See *id.*

respondent Daniel Schorr was unable to defend himself in a confrontation interview with Mike Wallace.⁷⁸ But where the press *wants* an interviewee to appear "dignified and articulate, it is customary practice to repeat the same question a number of times, allowing the respondent to 'sharpen his answers.'" ⁷⁹ It is also common for a news crew to rehearse with a subject prior to the interview, allowing him to grow accustomed to the lights and to practice fielding questions.⁸⁰ Sometimes the interviewee is even permitted to compose the questions he will be asked.⁸¹ For example, during an interview with Chet Huntley prior to the 1968 elections, Senator Edward Kennedy suggested various questions (while the camera was still running) which Huntley then conveniently asked him. The answers, absent the senator's "stage directions," were used in the completed interview, broadcast on the NBC Evening News.⁸² If political figures with vast public speaking experience need such solicitous treatment to appear "dignified and articulate," how can the average person hope to retain his credibility when subjected to an ambush interview?

d. *The Superior Credibility of the Reporter.* Credibility, meanwhile, is the special province of the investigative reporter, who is hired on the strength of his on-the-air "believability"—his capacity to inspire viewer confidence.⁸³ Television stations are

78. Stein, *supra* note 19, at 78–80; see also S. LESHER, *supra* note 14, at 123–24, 130–39 (detailing Wallace's interview with Schorr, broadcast on "60 Minutes").

79. E. EPSTEIN, *NEWS FROM NOWHERE: TELEVISION AND THE NEWS* 155 (1973). This is common, for example, when the interviewee has important information which the network wants conveyed in a clear, authoritative manner.

80. *Id.* at 155–56.

81. *Id.* at 155.

82. *Id.*

83. Goldsen Letter, *supra* note 21, at 2; cf. E. DIAMOND, *THE TIN KAZOO: TELEVISION, POLITICS, AND THE NEWS* 103–04 (1975). Diamond describes the elaborate process used by one New York City affiliate to find a new anchorman:

From a group of fourteen semifinalists, [the station] picked about six anchorman candidates, taking into account their reporting ability, camera presence, and contract availability. [The station's consultants] ran a series of experiments to test the public response to the talent. Interviewers in special vans . . . parked at suburban shopping centers and enticed passersby inside to watch a few minutes of tapes; people in the sample were then asked to explain why they preferred one anchorman to another. In addition, viewers were brought to [the station] and paid to watch tapes and vote their choices. . . . [T]apes were shown at a theater in California where the seats are fitted with levers to register audience reaction (and where viewers wouldn't recognize New York faces). Phone interviews and written questionnaires followed up the tests.

Id. Television reporters enjoy a particularly high level of public confidence. See Wilson & Howard, *supra* note 41, at 74 (survey finding pervasive feeling that television journalists are more skilled and experienced than their newspaper and radio counterparts).

sensitive to, and well-informed about, the factors that influence viewers' trust in a reporter.⁸⁴ An increasing number of local stations are hiring news consultants to provide detailed statistical research of viewing traits in their markets.⁸⁵ Journalism and broadcasting journals also offer research studies examining viewer evaluations of news reporters,⁸⁶ and credibility studies focusing on a reporter's voice quality⁸⁷ and personal appearance.⁸⁸

e. *Viewer Identification with the Reporter.* Viewer confidence in a reporter leads to viewer *identification* with that reporter.⁸⁹ "Each news show is staged to invite the audience to identify the reporter's interests with the public interest—with their own interests. Reporters are chosen for their ability to invite such identification."⁹⁰ Viewer identification is especially strong in the context of investigative reporting, where the reporter can be said to *represent* the viewer—to uncover corruption *on the viewer's behalf*.⁹¹

Advocacy/confrontation journalism, with its emphasis on exposing wrongdoing, requires sharply delineated "good guys" and

84. Goldsen Letter, *supra* note 21, at 2; see also Fuller, *News Doctors: Taking Over TV Journalism?*, BROADCASTING, Sept. 9, 1974, at 21, 22-23 (describing functions of television station news consultants). Research surveys sampling specific viewer reactions and measuring audience demography are conducted at local stations. E. DIAMOND, *supra* note 83, at 92. News consultants use this data to make recommendations about on-air talent and measure qualifications of prospective reporters. *Id.* at 93. One New York City consultant for NBC uses a "test facility" where he and his clients can observe, through one-way glass, a group of unsuspecting people viewing a particular news broadcast. *Id.* at 92. These people, termed a "discussion group," rate the program's talent and news items. The consultant's confidential report to management analyzes news talent in terms of their contribution to the program and presents recommendations on how to maximize their appeal. *Id.* at 98-99.

85. Fuller, *supra* note 84, at 22; *The News Doctors*, NEWSWEEK, Nov. 25, 1974, at 87.

86. See, e.g., Cathcart, *Viewer Needs and Desires in Television Newscasters*, 14 J. BROADCASTING 55 (1970); Shostek, *Factors Influencing Appeal of TV News Personalities*, 18 J. BROADCASTING 63 (1974).

87. See, e.g., Burgoon, *Attributes of the Newscaster's Voice as Predictors of His Credibility*, 55 JOURNALISM Q. 276 (1978).

88. See, e.g., Sanders & Pritchett, *Some Influences of Appearance on Television Newscaster Appeal*, 15 J. BROADCASTING 293 (1971).

89. See S. LESHER, *supra* note 14, at 116 ("[V]iewers identify with those correspondents who ask the questions they would ask and register the same kind of awe, disbelief, amusement, bemusement."); Stein, *supra* note 19, at 30 ("It is essential to ['60 Minutes'] executive producer Don] Hewitt's conception of the show that viewers identify with the four on-the-air personalities.").

90. Goldsen Letter, *supra* note 21, at 2.

91. Don Hewitt introduced this enormously successful concept: "[t]he casting of the correspondent as a stalwart, facing down foes on behalf of the viewing audience." S. LESHER, *supra* note 14, at 116.

"bad guys."⁹² This necessitates deliberate casting.⁹³ investigative reporters are made up and costumed to *play the role* of public advocates, "stalwarts" who, in their pursuit of corruption, adhere to a recognizable formula.⁹⁴ By casting the reporter in this role and placing him in a regular scenario of conflict with wrongdoers, television investigative reporting invites the audience to identify with the reporter as if he were the protagonist in a drama.⁹⁵

Television blurs the line between news and entertainment. Executive producer Don Hewitt has openly conceded that "60 Minutes" is "a show about the *adventures* of four reporters."⁹⁶ Like fictional adventure/drama programs, "60 Minutes" presents viewers with a conflict involving a familiar cast of characters and a story featuring a series of dramatic complications which build to a climax.⁹⁷ This notion of news shows as adventure/drama is not merely metaphorical. Studies have found that viewers are in an "entertainment processing mode" when they watch television news,⁹⁸ and are *motivated* by a desire for entertainment when they select a news program.⁹⁹

Because viewers identify with the investigative reporter,¹⁰⁰ they are likely to side with him when he encounters the ambush

92. *Id.* at 31; cf. E. EPSTEIN, *supra* note 79, at 173 ("The one ingredient most producers interviewed claimed was necessary for a good action story was visually identifiable opponents clashing violently. This, in turn, requires some type of stereotype. . . . [Otherwise,] as one CBS producer put it, 'it would be hard to tell the good guys from the bad guys.'").

93. See Shaw, *supra* note 14, at 7. "[In] '60 Minutes,' [Mike] Wallace has a role to play—a character to portray . . ." *Id.*

94. Goldsen Letter, *supra* note 21, at 1.

95. *Id.* at 2; see also M. ARLEN, *THE CAMERA AGE: ESSAYS ON TELEVISION* 158–79 (1981) (likening Dan Rather's performance in "60 Minutes" episode to that of prosecutor in courtroom drama); S. LESHER, *supra* note 14, at 31 (likening advocacy/confrontation journalism to good guy-bad guy showdowns of Grade B Westerns).

96. Stein, *supra* note 19, at 30 (emphasis in original).

97. Rubin, *A Multivariate Analysis of "60 Minutes" Viewing Motivations*, 58 JOURNALISM Q. 529, 534 (1981).

98. See, e.g., Mulder, *Media Credibility: A Use-Gratifications Approach*, 57 JOURNALISM Q. 474 (1980). When viewers are in an "entertainment processing mode" they are less critical, less skeptical, "less likely to search and discover news errors than if they were operating in the information processing mode" of newspaper reading. *Id.* at 474. If a viewer's critical faculties are in fact suspended while watching television news, he will be more accepting of the manner of presentation and, thus, more likely to accept the guilty persona that the ambush interview imposes on its subject.

99. *Id.*; see also Hofstetter & Buss, *Motivation for Viewing Two Types of TV Programs*, 58 JOURNALISM Q. 99, 102 (1981) (television viewers have virtually identical motivations for watching both entertainment and public affairs programming; i.e., people are looking for entertainment even when they view television news).

100. See *supra* text accompanying notes 89–95.

interviewee. Indeed, his conspicuous role as "good guy" invites viewers to perceive the interviewee as a "bad guy."¹⁰¹ Moreover, the unique credibility of the reporter¹⁰²—the special trust placed in him as the nightly disseminator of facts¹⁰³—will likely influence an audience to accept his accusations as true.

f. *The Guilty Picture Supersedes the Subject's Words.* Ultimately, the ambush interviewee cannot hope to defend himself effectively because he is forced to respond "through the voice of the accuser."¹⁰⁴ Under the circumstances, he will only be able to muster a few indignant words—but the language of television is visual, not verbal.¹⁰⁵ The *image* of an anxious, angry interviewee will supersede any statement he makes.¹⁰⁶ Nothing he can say will neutralize the impact of the *picture*: a man hastening to avoid the questions of a public advocate.¹⁰⁷ Moreover, viewers fail to remember the details of an interview.¹⁰⁸ They only remember

101. Goldsen Letter, *supra* note 21, at 3.

102. See *supra* notes 83–88 and accompanying text.

103. The extraordinary trust that viewers place in television newscasters is dramatically exemplified by a phenomenon called "parasocial interaction." In parasocial interaction, "the audience learns to recognize and more importantly to *interact* with the . . . journalists who appear frequently on television." Levy, *Watching TV News as Para-Social Interaction*, 23 J. BROADCASTING 69, 69 (1979) (emphasis added). The Levy study indicates that a majority of viewers experience parasocial interaction with television news personalities. Newscasters encourage the parasocial relationship by speaking in conversational tones directly into the camera. *Id.* More than half of Levy's respondents acknowledged that they consider the newscaster almost like a friend they saw daily. This feeling of friendship often results in interaction. *Id.* at 72. Thus, for example, when a newscaster opens the telecast with "Good evening from NBC News in New York," some viewers respond with their own friendly greeting. The anchorman's sign off may elicit a similar response. In addition, 68% of network viewers stated that they noticed when their anchorman was on vacation and 25% admitted being upset by his absence. Thirty-one percent of the respondents actually admitted that the anchorman's feeling about a news item influenced their opinion regarding that item. *Id.* at 73. The study also found "viewer empathy" for television newsmen. *Id.* at 75. The study concluded that, on the average, more than half of the respondents exhibited parasocial behavior, *id.* at 71, and that parasocially interactive viewers perceive a genuine "bond" which they see newscasters as reciprocating. *Id.* at 78. Such viewers "experience a sense of order, belonging, and context from their relationship with the news personae." *Id.* In light of this profound "bond" between viewers and reporters, one can appreciate how difficult it will be for an ambush interviewee, pitted against the reporter in an adversarial relationship, to be viewed sympathetically by the audience.

104. S. LESHNER, *supra* note 14, at 164 (quoting an ambush interviewee); cf. Stein, *supra* note 19, at 78 (according to Mike Wallace, "[y]ou have the power to convey any picture you want.").

105. Goldsen Letter, *supra* note 21, at 4.

106. J. HILTON & M. KNOBLAUCH, *supra* note 74, at 160.

107. Goldsen Letter, *supra* note 21, at 4.

108. J. HILTON & M. KNOBLAUCH, *supra* note 74, at 160; cf. E. DIAMOND, *supra* note

whether the interviewee was "likable."¹⁰⁹ Thus, in an ambush interview the *content* of the accusations evaporates, but the perception of bad-guyness lingers.¹¹⁰

g. *Production Techniques Further Undermine the Subject's Credibility.* The interviewee's credibility may be further undermined by the effect of lighting, camera angle, camera movement, and sound recording.¹¹¹ The "stalking" movement of the hand-held camera as it aggressively approaches the subject may contribute to viewer perception of his guilt,¹¹² or the cameraman may photograph the subject from a low angle to create a "sinister" look.¹¹³ Moreover, because the ambush subject is often encountered on the street or behind a building, he will be introduced "in shadow, a technique that suggests symbolic evil, darkness, all the [qualities] we associate with the lack of light (virtue)."¹¹⁴ Finally, the recording of the interviewee's voice may considerably undermine his credibility. Studies emphasize that polished voice and speech are crucial to creating viewer appeal.¹¹⁵ In general, inexperienced subjects tend to be very nervous at the beginning of an interview, resulting in a tense, breathy voice quality.¹¹⁶ Studies have found that breathy or tense voice quality impairs viewer retention and undercuts the speaker's credibility.¹¹⁷ Due to the na-

83, at 65-67 (describing study which found that 51% of viewers were unable to recall *any* stories from evening's broadcast only minutes after watching it).

109. J. HILTON & M. KNOBLAUCH, *supra* note 74, at 160.

110. Goldsen Letter, *supra* note 21, at 3. Note, then, how difficult it will be for the ambush interviewee to redeem himself in the public eye. His only mode of response is to attack the validity of the allegations leveled against him; but the viewers have largely *forgotten* those allegations almost immediately after they were made. See *supra* note 108. What viewers retain is a cloudy perception of the victim as a "bad guy"—a perception that cannot be dispelled by detailed refutations. Thus, viewers will remember enough about an ambush interview to be suspicious of the interviewee, but too little to be receptive to his refutations. "We grasp the general patterns, the types, the formula. There's [the reporter] yet again routing out chicanery and corruption. There's the bad guy, the one running away." Goldsen Letter, *supra* note 21, at 3.

111. Giannetti Letter, *supra* note 21. For an extensive study of how technique affects meaning in cinema and television, see L. GIANNETTI, *UNDERSTANDING MOVIES* (3d ed. 1982).

112. Giannetti Letter, *supra* note 21.

113. *Id.*

114. *Id.*

115. See, e.g., Shosteck, *supra* note 86, at 68-70 (voice and speech even more important than personality and appearance); see also Burgoon, *supra* note 87, at 281 (vocal characteristics have powerful effects on credibility judgments).

116. J. HILTON & M. KNOBLAUCH, *supra* note 74, at 74.

117. See, e.g., Hadwiger, *Some Effects of Voice Quality on Retention*, 14 J. BROADCASTING 317, 322-24 (1970). It is interesting to note that the researchers in this study found

ture of ambush interviews, this problem will be particularly severe for the ambush interviewee.

Ultimately, then, the ambush interview involves an accusation¹¹⁸ made by a credible¹¹⁹ citizen with whom viewers identify,¹²⁰ and creates a defensive,¹²¹ evasive¹²² response. It therefore *inherently* depicts¹²³ its subject as guilty.

h. *The Futility of "No Comment."* The justification for the ambush technique is that the subject is free to say "no comment," and that by engaging in conversation with the reporter he impliedly consents to the interview. This argument ignores the incriminating implications of refusing to talk. Hurrying past a television camera and muttering "no comment" may actually be worse than standing ground and doing battle.¹²⁴ It is analogous to pleading the fifth amendment; it implies that the individual has something to hide.¹²⁵

The only defense available to an ambush reporter is truth—that the subject really is guilty of that which he has been accused. Any subject not guilty as accused will invariably be made to *look* guilty, and thus shown in a false light before the community.

breathy, tense voice quality to be associated with the "bad guy" in radio drama. *Id.* at 317. Subsequent studies confirm that such voice quality impairs the speaker's credibility. See, e.g., Hutchinson, *The Effect of Newscaster Gender and Vocal Quality on Perceptions of Homophily and Interpersonal Attraction*, 26 J. BROADCASTING 457, 459-60 (1982).

118. See *supra* notes 55-61 and accompanying text.

119. See *supra* notes 83-88 and accompanying text.

120. See *supra* notes 89-99 and accompanying text.

121. See *supra* notes 62-64 and accompanying text.

122. See *supra* notes 65-78 and accompanying text.

123. See *supra* notes 104-17 and accompanying text.

124. Goldsen Letter, *supra* note 21; see J. HILTON & M. KNOBLAUCH, *supra* note 74, at 135-41; Hentoff, *Privacy and the Press: Is Nothing Sacred?*, SATURDAY REV., July 21, 1979, at 22, 22; cf. Shales, *supra* note 14, at H1, col. 6 ("[I]n the visual vocabulary of 'investigative' TV sleuthing, slamming a door [in the face of a reporter] is tantamount to an admission of guilt."); Transcript at 22-23, CBS News Special, "Eye on the Media: Business and the Press," broadcast on Dec. 25, 1982 (president of Southern California Edison asserts that refusing to talk to reporters arouses their suspicion, causing them "to play the story harder against you"). But see C. STEWART & W. CASH, *supra* note 71, at 152 ("no comment" definitely implies degree of guilt, but declining to talk "may be preferable to foolish comments that become headlines.").

125. Goldsen Letter, *supra* note 21, at 4. Is there anything the ambush victim can say or do to the reporter to neutralize the unflattering effect of the ambush technique? Dr. Goldsen suggests: "[T]hrow your arms around him, stroke his cheek, grasp his hand, muttering something to the effect that you're a fan of his, you've admired his work, and so on." *Id.* at 5. In this way, "the visual images do not play by the reporter's rules." *Id.*

4. *Times Malice*

The victim of an ambush interview, if he is to successfully bring a false light action, must also establish *Times malice*.¹²⁶ In *Machleder*, the district court found that the record did not preclude the possibility that the news crew knowingly depicted the interviewee as guilty of the dumping.¹²⁷ In fact, *Times malice* exists *whenever* the ambush technique is employed. In each case the news crew has made a deliberate decision¹²⁸ to catch the victim unprepared¹²⁹ and show him at his worst. No one is more sensitive or knowledgeable about on-the-air credibility than the broadcaster.¹³⁰ Thus, a television news crew that waits for and deliberately startles a subject with unsettling accusations shows a reckless, if not intentional, disregard for creating a fair, accurate portrayal.

The *Times malice* requirement reflects a firm commitment to first amendment freedom of the press.¹³¹ If the requisite knowing

126. See *supra* notes 33-37 and accompanying text.

127. 538 F. Supp. at 1375.

128. See S. LESHER, *supra* note 14, at 118.

129. See *Le Mistral, Inc. v. CBS*, 61 A.D.2d 491, 493 n.1, 402 N.Y.S.2d 815, 816 n.1 (App. Div. 1978); *supra* note 18.

130. See *supra* notes 83-88 and accompanying text. The following is a sampling of the enormous volume of research published in broadcasting and journalism periodicals over the past 15 years exploring communicator credibility: Addington, *The Effect of Vocal Variations on Ratings of Source Credibility*, 38 SPEECH MONOGRAPHS 247 (1971); Balon, Philport & Beadle, *How Sex and Race Affect Perceptions of Newscasters*, 55 JOURNALISM Q. 160 (1978); Berlo, Lemert & Mertz, *Dimensions for Evaluating the Acceptability of Message Sources*, 33 PUB. OPINION Q. 563 (1969-70); Burgoon, *supra* note 87; Cathcart, *supra* note 86; Hadwiger, *supra* note 117; Houlberg & Dimmick, *Influences on TV Newscasters' On-Camera Image*, 57 JOURNALISM Q. 481 (1980); Hutchinson, *supra* note 117; Jacobson, *Mass Media Believability: A Study of Receiver Judgments*, 46 JOURNALISM Q. 20 (1969); Mandell & Shaw, *supra* note 51; Markham, *The Dimensions of Source Credibility of Television Newscasters*, 18 J. COM. 57 (1968); McCain, Chilberg & Wakshlag, *supra* note 69; Milbourn & Stone, *Source-Message Orientation and Components of Source Credibility*, 49 JOURNALISM Q. 663 (1972); Pierce, *Party, Ideology and Public Evaluations of the Power of TV News People*, 54 JOURNALISM Q. 307 (1977); Sanders & Pritchett, *supra* note 88; Shostek, *supra* note 86; Singletary, *Components of Credibility of a Favorable News Source*, 53 JOURNALISM Q. 316 (1976); Smith & McEwen, *Effect of Newscast Delivery Rate on Recall and Judgment of Sources*, 18 J. BROADCASTING 73 (1973-74); Stone, *Attitudes Toward Television Newswomen*, 18 J. BROADCASTING 49 (1973-74); Stone & Hoyt, *Effect of Likability and Relevance of Expertness*, 51 JOURNALISM Q. 314 (1974); Stone & Eswara, *The Likability and Self-Interest of the Source in Attitude Change*, 46 JOURNALISM Q. 61 (1969); Tankard, *Eye Contact Research and Television Announcing*, 15 J. BROADCASTING 83 (1970-71); Tiemens, *Some Relationships of Camera Angle to Communicator Credibility*, 14 J. BROADCASTING 483 (1970); Whitehead, *Factors of Source Credibility*, 54 Q.J. SPEECH 59 (1968); Whittaker & Whittaker, *Relative Effectiveness of Male and Female Newscasters*, 20 J. BROADCASTING 177 (1976).

131. See *supra* notes 34-35.

or reckless falsehood is not established, press freedom is automatically considered superior to the individual's privacy interest. If, on the other hand, *Times* malice is present, as is the case in every ambush interview, freedom of the press is automatically viewed as being outweighed by the individual's privacy interest. The following section of the Note analyzes press freedom in the context of the ambush interview and weighs it against the privacy interest of the ambush interviewee.

II. BALANCING PRESS AND PRIVACY INTERESTS IN THE CONTEXT OF THE AMBUSH INTERVIEW

The right of privacy was first enunciated as a broad "right to be let alone."¹³² While many new definitions have since been offered, four basic interests emerge from the commentary: preserving personal dignity;¹³³ preserving personal autonomy;¹³⁴ maintaining control over the way others see us;¹³⁵ and having the power to erect a barrier through which society may not peer.¹³⁶

There are two basic purposes behind freedom of the press.¹³⁷

132. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195, 205 (1890). In calling for a right of privacy, Warren and Brandeis seem to have been stirred by excesses of the press:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Id. at 196.

133. See, e.g., Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1005 (1964) (privacy as "interest in preserving human dignity and individuality").

134. See, e.g., Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977) (isolating three elements as comprising privacy interest: "autonomy, identity, and intimacy").

135. See, e.g., A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974) (considering privacy as "control over when and by whom the various parts of us can be sensed by others") (emphasis deleted).

136. See, e.g., Konvitz, *Privacy and the Law*, 31 LAW & CONTEMP. PROBS. 272, 279-80 (1966) (privacy as the "claim that there is a sphere of space that has not been dedicated to public use or control").

137. One commentator sees newsmen as performing three basic functions: "neutral

to protect individual self-expression, and to promote responsible self-government by an informed citizenry.¹³⁸ Thus, it is the function of the press both to report about public events and serve as a forum for public debate.¹³⁹

The reporting function of the press extends far beyond purely political matters;¹⁴⁰ freedom of the press "must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period."¹⁴¹ Citizens cannot hope to stay abreast of all the news by themselves, but must rely upon the press.¹⁴² More narrowly, the press plays a significant role as a "watchdog,"¹⁴³ looking out for the interests of

finders and conveyors of information"; "watchdogs" of government; and, on rare occasions, advocates of reform. Weaver, *The New Journalism and the Old—Thoughts After Watergate*, PUB. INTEREST, Spring 1974, at 67, 74. See generally Lewels, *Critical Attitudes Toward the Media*, 6 EDUC. BROADCASTING REV. 339 (1972) (survey of public attitudes toward news media finding six basic attitude types, each affected by different presumptions about proper role and function of the press).

138. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 149 (1967) (free speech and press are guarantee of personal expression and "social necessity required for the 'maintenance of our political system and an open society.'") (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 861–62 (1974) (Powell, J., dissenting) (both individual and societal interests underlie freedom of press) (citing *Z. Chafee, Free Speech in the United States* 33 (1954)); *G. Gunther, Cases and Materials on Constitutional Law* 1108 (10th ed. 1980) ("Two themes are most prominent in the judicial and philosophical justifications for free speech: one emphasizes the function of freedom of speech in individual self-expression and development of individual potential; the other stresses the value of freedom of expression for a system of representative democracy and self-government."). These interests can be traced back through two separate philosophers. Jeremy Bentham was the great proponent of a free press as "security against misrule." D. LONG, *BENTHAM ON LIBERTY* 198–99 (1977). John Stuart Mill was the champion of press freedom as a vehicle for individual self-expression. See J.S. MILL, *ON LIBERTY* 28 (2d ed. Boston 1863) (1st ed. London 1859).

Cases and treatises frequently convey the impression that promotion of self-government is the preeminent purpose of freedom of the press. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing that "public" speech should be totally unregulated whereas "private" speech is not deserving of such broad protection).

139. See *New York Times Co. v. Starkey*, 51 A.D.2d 60, 63, 380 N.Y.S.2d 239, 243 (1976).

140. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 42 (1971).

141. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

142. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting). "An informed public depends on accurate and effective reporting by the news media. . . . For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the people at large." *Id.*; cf. *Pell v. Procunier*, 417 U.S. 817, 833 (1974) (information-gathering is entitled to some measure of constitutional protection); *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972) (same).

143. But cf. M. ARLEN, *supra* note 95, at 172–73 ("Investigative reporters . . . are the

the public¹⁴⁴ and reminding those in power of their duties.¹⁴⁵ The press therefore should have the freedom to pursue the truth vigorously.¹⁴⁶ With this freedom, however, goes the responsibility not to infringe upon the rights of citizens.¹⁴⁷ "[Without] a lively sense of responsibility a free press may readily become a powerful in-

guard dogs of society, but the trouble with guard dogs is that they sometimes attack with equal fervor the midnight burglar and the midday mailman." In the wake of Watergate and the widespread glorification of investigative journalists, some members of the press began to question the great emphasis that had come to be placed on the press's watchdog function. See, e.g., *Jugular Journalism?*, *supra* note 20, at 79; Scali, *supra* note 20, at 31; see also Fulbright, *Fulbright on the Press*, COLUM. JOURNALISM REV., Nov.-Dec. 1975, at 39, 42 (although press has had considerable success in exposing wrongdoing, "it has fallen short—far short—in its higher responsibility of public education"). One commentator cautioned that "the search for wrongdoing—and, perhaps for Pulitzers—has become almost obsessive," what *Washington Post* press critic Charles Seib describes as "an aggravated instinct for the jugular." *Jugular Journalism?*, *supra* note 20, at 79. The Associated Press chief was moved to warn his reporters that "[t]he First Amendment is not a hunting license." Consoli, *Gallagher Cautions Press*, EDITOR & PUBLISHER, May 8, 1976, at 14. He further reminded them that "'90% of journalism is keeping the public informed of what is going on from day to day.'" Scott, *One-Sided Reporting Hit by Associated Press Chief*, EDITOR & PUBLISHER, Jan. 25, 1975, at 10. When the press performs this function thoroughly, there is less need for it to play the role of investigator/watchdog. *Id.*

144. See *Estes v. Texas*, 381 U.S. 532, 539 (1965) ("The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . ."); *New York Times Co. v. United States*, 403 U.S. 713, 717 (Black, J., concurring) (press is protected by first amendment to "bare the secrets of government and inform the people").

145. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve."); see also *Grosjean v. American Press Co.*, 297 U.S. 233, 247-48 (1936) ("The liberty of opinion keeps governments themselves in due subjection to their duties." (quoting Erskine)); Graham, *A Vigilant Press: Its Job to Inform*, VITAL SPEECHES, May 15, 1974, at 460, 460 ("The press . . . is meant to be a watchdog, informing the public of what is really going on and thus keeping those who govern perhaps more honest, certainly more accountable—and thus dishonest only at some peril to their tenure and their power.").

146. For the Founding Fathers, a free, vigorous press was so important that it was worth the abuses it would inevitably commit. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967) ("Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press." (quoting Madison); see also *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 51 (1971); E. BURNS, JAMES MADISON: PHILOSOPHER OF THE CONSTITUTION 82 (1968); C. PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 185-88 (1953).

147. See *Pennekamp v. Florida*, 328 U.S. 331, 356 (1946) (Frankfurter, J., concurring) ("In plain English, freedom carries with it responsibility even for the press; freedom of the press is not freedom from responsibility for its exercise."); Fulbright, *supra* note 143, at 43 ("[B]ecause the press cannot and should not be restrained from outside, it bears a special responsibility for restraining itself . . ."); see also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150 (1967).

strument of injustice."¹⁴⁸ The zeal of the press should not be encouraged at the expense of accuracy and fairness.¹⁴⁹

A. *The Impact of the Ambush Interview on Personal Privacy*¹⁵⁰

In the immediate aftermath of Watergate, a Gallup poll found considerable public support for an adversary posture by the news media.¹⁵¹ The same poll found, however, that even during this period of public acclaim for the press seventy-seven percent of those surveyed were concerned that "newspapers often make innocent persons look guilty before they are tried in court."¹⁵² Since that time, public confidence in the news media has declined dramatically.¹⁵³ By 1975, Associated Press chief Wes Gallagher had

148. *Pennekamp*, 328 U.S. at 365 (Frankfurter, J., concurring).

149. See Fulbright, *supra* note 143, at 43 ("Journalists bear an exceedingly important responsibility for keeping office holders honest; they have an equally important responsibility for keeping themselves honest, and fair."); *A Flap Over TV's "20/20," supra* note 43, at 53 (quoting special report by WBBM-TV, Chicago, condemning investigative techniques which seek so aggressively to reveal truth that they distort it); see also M. ARLEN, *supra* note 95, at 174 (investigative techniques produce one-sided "quasi-trial" and resulting reports "drift fairly far from orderly or reporterly presentation of information"); Scali, *supra* note 20, at 32 ("One of the unexpected, ugly byproducts of the investigative obsession is that some are not as careful as they should be in their furious search for the big story . . .").

150. A 1979 Harris poll found that 76% of Americans feel that the right to privacy should be an inalienable right, like the rights to life, liberty, and the pursuit of happiness. LOUIS HARRIS & ASSOC., *THE DIMENSIONS OF PRIVACY: A NATIONAL OPINION RESEARCH SURVEY OF ATTITUDES TOWARD PRIVACY 15* (1979) [hereinafter cited as HARRIS POLL].

151. *Public Supports Adversary Role of News Media*, EDITOR & PUBLISHER, Jan. 12, 1974, at 41.

152. *Id.* Note that 40% agreed with this proposition and 37% agreed in part.

153. See *Journalism Under Fire*, TIME, Dec. 12, 1983, at 76; *The Press: In Deeper Trouble with Public*, U.S. NEWS & WORLD REP., Sept. 20, 1982, at 68. Popular music often reflects public sentiment more vividly than polls. A recent song entitled "Dirty Laundry" provides a measure of public disenchantment with the news media:

I make my living off the Evening News
Just give me something—something I can use
People love it when you lose,
They love dirty laundry

...

We got the bubble-headed bleach-blond who comes on at five
She can tell you 'bout the plane crash with a gleam in her eye
It's interesting when people die—
Give us dirty laundry
Can we film the operation?
Is the head dead yet?
You know, the boys in the newsroom got a running bet
Get the widow on the set!
We need dirty laundry

...

Dirty little secrets

become alarmed by the aggressive tactics employed by investigative reporters, and warned that "[t]he press is becoming increasingly unpopular with the public so we must be more careful when we go after somebody."¹⁵⁴ By 1980, a television newsman was warning his colleagues that public distrust for the news media was "vehemently felt, virulent in its intensity," and that some of the distrust was caused by "the prosecuting type of interviewing being practiced on the national tv level and emulated by newspeople at the local level."¹⁵⁵ More recently, an ABC News poll found that sixty-two percent of the public would favor a law preventing reporters from questioning unwilling subjects.¹⁵⁶

Only in this context of increasing public objection to aggressive reporting techniques can one properly assess the impact of the ambush interview on personal privacy. At the outset, it is important to distinguish between merely photographing someone in a public place, which is not an invasion of privacy,¹⁵⁷ and the am-

Dirty little lies
 We got our dirty little fingers in everybody's pie
 We love to cut you down to size
 We love dirty laundry
 We can do "The Innuendo"
 We can dance and sing
 When it's said and done we haven't told you a thing
 We all know that Crap is King
 Give us dirty laundry!

"Dirty Laundry" (D. Henley/D. Kortchmar) © 1982 Cass County Music & Kortchmar Music. Reprinted with permission of Front Line Management Co., Los Angeles.

154. *One-Sided Reporting Hit by Associated Press Chief*, *supra* note 143, at 10; cf. *Chancellor Zings TV Lens Pointers at Local Stations*, *Variety*, Mar. 18, 1981, at 1, col. 6.

155. *Prosecutor-Like Air Media Loses Public Respect*, *Variety*, Nov. 26, 1980, at 2, col. 5, 126, col. 5 (quoting Robert MacNeil, co-anchor of "MacNeil-Lehrer Report"); see also M. ARLEN, *supra* note 95, at 158-79 (likening Dan Rather's performance in "60 Minutes" episode to that of a prosecutor in a courtroom drama); Hentoff, *supra* note 124, at 22 ("[J]ournalists are second only to the state in their imperiling of individual privacy. They often act like undercover cops and sometimes like righteously aggressive prosecutors."). The intimidating tactics adopted by some reporters are reflected in survey results showing that viewers feel television news people possess too much power. For example, a Harris poll found that the news media is perceived to be one of the five biggest "private sector" invaders of privacy, HARRIS POLL, *supra* note 150, at 6, and that approximately one out of three Americans feels that the news media asks for too much personal information, *id.* at 60. Also indicative of this attitude is an advertisement recently placed on the editorial page of the *New York Times* by Mobil Oil Co., reprinting the Code of Ethics of the Society of Professional Journalists and urging the news media to "adopt and enforce" this code. *N.Y. Times*, Nov. 18, 1982 (emphasis in original). See generally Thomson, *Journalistic Ethics: Some Probing by a Media Keeper*, NIEMAN REP., Winter/Spring 1978, at 7 (offering brief history of American journalists' ethical codes and suggesting how press can more effectively police itself).

156. *The Press: In Deeper Trouble With Public*, *supra* note 153, at 70.

157. See, e.g., *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081 (E.D. Pa. 1980); *Berg v. Minne-*

bush technique. Unlike mere photography, the ambush interview is not the simple recording of an event—it *creates* an event. Rather than merely portraying the subject going about his business, the ambush interview *pulls him away* from his business.¹⁵⁸

Photography in a public place is not an invasion of privacy because of its *passivity*. It “amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see.”¹⁵⁹ Photography merely shows us as we appear to others, and in public we are *prepared* to be seen by others. In contrast, the ambush interview unmasks the subject by intercepting him and recording his unguarded reaction to an embarrassing accusation. It breaks through his public persona, depriving him of control over the way others will see him, and thus robs him of his autonomy and his dignity—four interests considered central to the privacy concept.¹⁶⁰

B. *The Ambush Technique: Furthering or Conflicting With the Goals of Press Freedom?*

1. *Foreclosing Discussion*

Reporters attempt to justify the ambush technique on the ground that startling the interviewee will make him reveal the truth.¹⁶¹ But experienced interviewers have found that greeting a

apolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948); see also Mark v. Seattle Times, 96 Wash. 2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982). In *Mark*, a pharmacist being prosecuted for medicaid fraud brought an intrusion action against a television station. The station's cameraman had approached plaintiff's pharmacy after hours, pressed his lens to a window, and photographed plaintiff talking on the telephone. *Id.* at 479–80, 635 P.2d at 1085. The court held that there had been no actionable intrusion because the cameraman had never entered the pharmacy and had photographed something that any passerby could have viewed. *Id.* at 499, 635 P.2d at 1095.

158. See Plaintiffs' Memorandum of Law in Support of Their Cross-Motion and in Opposition to Defendants' Motion for Summary Judgment at 34–35, *Machleder* (“This was not the case of a photographer coming upon an angry, disoriented person and filming him. Rather, the defendants were catalysts and produced the humiliating emotional state in which Machleder was recorded. The defendants were not merely observers; they were provocateurs who created the event.”) [hereinafter cited as Plaintiffs' Memorandum].

159. W. PROSSER, *supra* note 31, at 809.

160. See *supra* notes 133–36 and accompanying text.

161. See *Le Mistral, Inc. v. CBS*, 61 A.D.2d 491, 493 n.1, 402 N.Y.S.2d 815, 816 n.1 (1978); Carley, *supra* note 11, at 12, col. 5 (quoting Geraldo Rivera); cf. J. BRADY, *supra* note 73, at 92–93 (an important goal of interviews is to get the subject “to say something that he or she may not really have thought about . . . and that would be terribly revealing if it finally comes out.”) (quoting *Village Voice* columnist Nat Hentoff). Mike Wallace describes the justification as applying “heat” to get “light”; but Wallace has come to reject

subject with aggressive questions will cause him to "close up."¹⁶² Interviewing manuals stress that communication with an interviewee cannot occur until the reporter has established a "rapport" and has gained the subject's "trust."¹⁶³ Until the subject "feels comfortable with you," said one veteran interviewer, "it's not likely that he will feel like disclosing anything more intimate than his hat size."¹⁶⁴ Successful communication requires that the subject be given an opportunity "to think, and to gather thoughts and composure";¹⁶⁵ it means that "the interviewer must listen in a nonjudgmental way."¹⁶⁶

The ambush interview has therefore aptly been described as a technique "designed to show a man declining to talk."¹⁶⁷ Though the reporter is ostensibly seeking an explanation from the subject, he is actually uninterested in what the subject will say.¹⁶⁸ The ambush reporter is not looking for words—he knows that the subject will be too disconcerted to say anything intelligible.¹⁶⁹ The reporter is looking for *pictures*.¹⁷⁰ He seeks to elicit not information but consternation. The real purpose of the ambush interview is not to get answers but to frame an accusation in the most dra-

the ambush technique as actually applying "heat for heat's sake." See S. LESHER, *supra* note 14, at 154; Carley, *supra* note 11, at 12, col. 5; Schwartz, *supra* note 14, at 20, col. 5.

162. See, e.g., J. BRADY, *supra* note 73, at 91–92 (quoting *Washington Post* reporter Sally Quinn). Tough questions will produce revealing answers only after hours of interaction between interviewer and subject. See *id.* at 91; Daley, *supra* note 5, at 70.

163. See J. BRADY, *supra* note 73, at 49, 68; C. STEWART & W. CASH, *supra* note 71, at 145. This is essential even for aggressive reporters who employ leading questions. J. BRADY, *supra* note 73, at 81. Even a reporter planning to ask tough questions is advised to open the interview "on an innocuous or ego-supportive note" to create an atmosphere conducive to communication. K. METZLER, *CREATIVE INTERVIEWING* 94 (1977); see also J. BRADY, *supra* note 73, at 51–52.

164. J. BRADY, *supra* note 73, at 52 (quoting Barbara Walters).

165. C. STEWART & W. CASH, *supra* note 71, at 149.

166. K. METZLER, *supra* note 163, at 28 (emphasis deleted).

167. Shales, *supra* note 14, at H4, col. 5; see also Transcript at 19, CBS News Special, "Eye on the Media: Business and the Press," broadcast Dec. 25, 1982 ("Mike [Wallace] knows how to do it: read those questions that [the subject] won't answer. That's tremendous.") (quoting *Wall Street Journal* Executive Editor Frederick Taylor).

168. When reporters are *interested* in what an interviewee has to say, when they want a clear, articulate response, they make every effort to create an atmosphere in which he can deliver calm, clear-headed answers. See *supra* notes 79–81 and accompanying text.

169. See Shaw, *supra* note 14, at 7 (describing the ambush interviewer's questions as "unanswerable").

170. Plaintiffs' Affidavit in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion at 25, *Machleder* (quoting Transcript at 15–16, "Watching the Watchdog," report by WBBM-TV, Chicago, broadcast Apr. 20, 1981) [hereinafter cited as Plaintiffs' Affidavit]. "Television demands pictures. And the ambush interview provides dramatic pictures." *Id.*

matic manner possible¹⁷¹—by enlisting the unwitting assistance of the accused.¹⁷² The reporter presents his accusations in the form of dramatic questions, knowing that regardless of the answers the questions themselves contain the power of persuasion.¹⁷³ Through his questions, the reporter can lead the audience in any direction he wishes.¹⁷⁴

The ambush interview thus serves not to uncover truth but to *impose a conclusion* upon an issue that has yet to be fully explored.¹⁷⁵ While ostensibly a solicitation of the subject's views,

171. *Id.* The ambush technique "is designed for drama, not to elicit the truth." *Id.*

172. See *supra* notes 55–61 and accompanying text. The ambush technique not only makes the subject look guilty, but also creates the impression that he has been *caught in the act*. See Plaintiffs' Memorandum, *supra* note 158, at 35, *Machleder*.

173. M. ARLEN, *supra* note 95, at 163; see also Arlen, *The Interview*, NEW YORKER, Nov. 10, 1975, at 141 ("[T]he TV interrogator asserts his preconceptions, even offers his answers, in a lengthy question that he unrolls into his microphone and then allows the interviewee to sign.") (emphasis in original); Transcript at 8, CBS News Special, "Eye on the Media: Business and the Press," broadcast Dec. 25, 1982 (Mike Wallace concedes that reporter seeks to "educate" public as much through his questions as through subject's answers).

174. M. ARLEN, *supra* note 95, at 163.

175. Critics and journalists have charged that television investigative reporting is incapable of fully exploring the subjects it examines; that by its very nature it cannot deliver thorough, accurate reports. The problem is not television reporters, but built-in institutional factors such as insufficient time, money, and independence of the investigative units. See Kowet, *supra* note 18. The most important factor in investigative reporting is time. Weeks, sometimes months, are required to ask enough questions and conduct enough research to obtain a balanced, accurate, detailed account of the facts involved in an investigative story. Shaw, *supra* note 14, at 10; see Scott, *supra* note 143, at 10. "But few television stations consistently provide that kind of time for their reporters. News directors want their stars on camera. Often. Rarely can they afford to let a reporter . . . spend two or three months investigating one story." Shaw, *supra* note 14, at 10; see also MacNeil, *Investigative Reporting—Watch It!*, TELEVISION Q., Winter 1978–79, at 45, 47–48 (television is not well-suited for investigative reporting because, unlike newspaper owners, television station management is typically unwilling to commit necessary time and money); cf. S. LESHNER, *supra* note 14, at 243–44 (demonstrating constant pressure to get investigative pieces on air); R. POWERS, *supra* note 85, at 192–93 (reporters are paid according to *quantity* of stories they get on air; thus, investigative reporting on television will necessarily be superficial). Moreover, television reporters *want* to be on the air as frequently as possible: "It's their life blood." Shaw, *supra* note 14, at 10. Thus, they "hardly ever talk to enough people. . . . It's just quick, boom, once over and on the air." *Id.* (quoting Peabody Award-winning television producer Steve Singer).

Even "60 Minutes," with the resources of CBS News at its disposal, is hampered by time limitations in pursuing its investigations. After one "60 Minutes" report on youth gangs in Los Angeles, a member of the Mexican-American Education Commission complained that the show's producer had failed to acquire any knowledge of the community or culture. Instead, he relied upon stereotypes in depicting the youth gang scene, emphasizing only the violence—the negative side of the story. Stein, *supra* note 19, at 88–90. "You just don't come in here for a week and do a program on something as complicated as this—unless you're only after the most sensational aspects." *Id.* at 90.

the ambush interview, by denying the subject a fair opportunity to respond, actually serves as a vehicle for corroborating the reporter's allegations.¹⁷⁶ The ambush technique thereby acts to *foreclose*, rather than promote, discussion.¹⁷⁷

2. *Obscuring the Facts*

Although reporters may justify it as a means of getting answers, the ambush technique is remarkably unsuited for obtaining information.¹⁷⁸ It *provokes* instead of reveals.¹⁷⁹ Rather than eliciting a clear response, it stirs an emotional reaction and thus *clouds* the facts instead of clarifying them.¹⁸⁰

The ambush interview obscures the facts by creating a dramatic atmosphere, emphasizing revelation over information, and focusing attention on the newsgathering process at the expense of content. The ambush technique achieves drama by staging a showdown between good guy and bad guy.¹⁸¹ There is a danger, however, that the pursuit of drama may compromise the journalist's mandate to elicit the facts¹⁸²—a danger that the capacity of viewers to examine the issues will be lost in “the thrill of the chase: the excitement that comes from watching a quarry being pursued and brought down by aggressive questioning on the air.”¹⁸³

The ambush interview also obscures the facts by emphasizing revelation over information—by focusing less on *what* the subject has done than on whether he *admits* having done it.¹⁸⁴ Moreover,

176. See *supra* text accompanying note 60.

177. Plaintiffs' Affidavit, *supra* note 170, at 25, *Machleder* (quoting Transcript at 15–16, “Watching the Watchdog,” report by WBBM-TV, Chicago, broadcast Apr. 20, 1981) (by denying interviewee a reasonable opportunity to speak, ambush technique makes it possible to miss an important side of the story).

178. See K. METZLER, *supra* note 163, at 26 (confrontation approach “fails to obtain open communication”).

179. See S. LESHER, *supra* note 14, at 38 (the confrontation interview is “provocative” but “provocation is not synonymous with enlightenment”).

180. See K. METZLER, *supra* note 163, at 26 (confrontation approach serves to “obscure substance”).

181. See *supra* notes 92–99 and accompanying text. Mike Wallace has readily conceded that creating drama is the whole point of the confrontation interview. See S. LESHER, *supra* note 14, at 35; cf. Stein, *supra* note 19, at 76 (CBS News chief Richard Salant admitted that “[t]here is a tendency for ‘60 Minutes’ to do confrontations just for the sake of confrontations.”).

182. Schwartz, *supra* note 14, at 20, col. 4.

183. M. ARLEN, *supra* note 95, at 158; cf. Stein, *supra* note 19, at 76 (former CBS News president Fred W. Friendly described confrontation interview as a “‘game of fox and hare,’” motivated solely by a desire for ratings).

184. See S. LESHER, *supra* note 14, at 102.

the significance of the revelation will be measured not by its content but by the *difficulties* encountered by the reporter in extracting it:

[In the confrontation interview,] the news-gathering process itself has become part of the story—sometimes a key part, with the TV newsmen first shown outside, trying to get in; then inside, facing down an uncooperative or hostile subject, who in turn is shown in close-up on the screen . . . , often caught by the camera in a carefully edited grimace or expression of seemingly revealed truth which later may turn out not to have been truth at all—or truth of a quite different sort. One obvious result of this cinematic dramatization of the news interview is that the public is all too likely to follow the seductive flow of the news-gathering drama without paying very close attention to its content.¹⁸⁵

3. *Diminishing Reporter Objectivity*

Finally, the ambush interview lifts the reporter out of his traditional objective stance and places him in an *active*, involved role. It thus reduces the chances for an accurate account.

Following Watergate, the new mood of journalists was one of "truculent independence from government and officialdom."¹⁸⁶ The press clearly viewed itself as an independent investigative force, an adversary of government.¹⁸⁷ This change produced a press torn between its traditional "objective" role and its new "adversary" role.¹⁸⁸ There was much to encourage this new stance. Watergate had generated a justifiable mistrust of public officials, causing newsmen to feel that it was their job to unmask these "deceptive opponents."¹⁸⁹ Watergate had also shown that the rewards for exposing official wrongdoing were great.¹⁹⁰

Adversary journalism, however, was soon carried to the point

185. M. ARLEN, *supra* note 95, at 173-74; see also Plaintiffs' Affidavit, *supra* note 170, at 47, *Machleder* (noting that CBS reporter sought to justify use of ambush technique as depiction of the "process" he had to go through to obtain the information); cf. S. LESHER, *supra* note 14, at 118 (confrontation journalism, according to NBC correspondent Roger Mudd, focuses too much on dramatic perils of reporter); Shales, *supra* note 14, at H5, col. 2 ("In some cases, it appears the investigative tactics are becoming more important than the stories they attempt to uncover.") (quoting WBBM report).

186. Weaver, *supra* note 137, at 80.

187. *Id.*

188. *Id.* at 68.

189. E. EPSTEIN, *supra* note 79, at 215; see also Kristol, *Is the Press Misusing Its Growing Power?*, MORE, Jan. 1975, at 26 (adversary journalism resulted from "the tremendous gap of credibility and distrust which, in recent years, has opened between public officials and the press").

190. See, e.g., Fulbright, *supra* note 143, at 41; *Jugular Journalism?*, *supra* note 20, at

of hostility, to treating the government as "the enemy."¹⁹¹ The press became so preoccupied with uncovering official misconduct that it began to lose its perspective.¹⁹² One television newsmen complained that the press was deemphasizing the meaning and relevance of stories, focusing instead on what the subject was attempting to hide.¹⁹³ The Associated Press chief felt compelled to warn his reporters to avoid being overly suspicious.¹⁹⁴ Many newsmen came to realize that "by setting out to 'get' public figures—often for a single misstep in otherwise blameless careers—journalism runs the risk of becoming less explanatory than predatory."¹⁹⁵

While it is the duty of the press to pursue the truth vigorously, reporters must not allow their zeal to compromise their objectivity.¹⁹⁶ The danger of the ambush interview is that it makes the reporter a *participant* in the story.¹⁹⁷ Studies have found that high participant reporters lose the capacity to present fair, accurate, and objective reports.¹⁹⁸ Interviewing manuals warn against losing objectivity by becoming too aggressive, or too involved in a story.¹⁹⁹ Reporters are urged to remember that the interviewer should not be the opposition, but a "skeptical observer."²⁰⁰

79; MacNeil, *supra* note 175, at 45; Scali, *supra* note 20, at 32; *Uneasy Press Sets Out to Refurbish Its Image*, *supra* note 20, at 72.

191. Scali, *supra* note 20, at 33; *see also* Fulbright, *supra* note 143, at 41 (press has "become almost sweepingly iconoclastic" and "excessively mistrustful and even hostile" toward government).

192. Scali, *supra* note 20, at 32.

193. MacNeil, *supra* note 175, at 46.

194. Consoli, *supra* note 143, at 14.

195. *Jugular Journalism?*, *supra* note 20, at 82; *see also* Fulbright, *supra* note 143, at 41 (criticizing new "inquisitorial" style of journalism arising after Watergate).

196. *See supra* notes 146-49 and accompanying text.

197. The CBS "News Standards" manual forbids its reporters from participating in any news event: "'Our responsibility is to report and record news events—and *not* to initiate or shape them.'" Plaintiffs' Affidavit, *supra* note 170, at 47, *Machleder* (emphasis in original).

198. *E.g.*, Starck & Soloski, *Effect of Reporter Predisposition in Covering Controversial Story*, 54 JOURNALISM Q. 120 (1977).

199. *See, e.g.*, C. STEWART & W. CASH, *supra* note 71, at 146 ("Don't allow personal biases to intrude into questions and manner."); *see also id.* at 149 ("Avoid pressure tactics; the journalistic interview should not resemble a police interrogation."); *cf.* M. ARLEN, *supra* note 95, at 174 (questioning whether accuracy and objectivity are possible "when on-camera newsmen assume the mantle of prosecutors, in a quasi-trial context where they control the cameras and the editing machines and where there is no counsel for the defense."); Shales, *supra* note 14, at H1, col. 6 (questioning legitimacy of reporters acting in guise of "long arm of the law," and concluding that ambush tactic "may not be journalism at all.").

200. J. BRADY, *supra* note 73, at 89; *cf.* K. METZLER, *supra* note 163, at 27 (describing how adversarial approach serves to manufacture coverups).

One commentator has argued, moreover, that an adversarial stance by the press actually serves to impair its effectiveness as a watchdog.²⁰¹ By alienating public officials, the press severs its access to government. Without access, the press and the public will be left uninformed about the inner workings of government.²⁰²

In sum, the ambush interview is incompatible with the purposes of constitutional protection of freedom of the press, because it forecloses rather than promotes discussion;²⁰³ obscures rather than illuminates the facts;²⁰⁴ and, by involving the reporter as a *participant* and removing him from an objective role, diminishes the chances for accurate reporting.²⁰⁵

III. CONCLUSION

CBS News has a standing policy directive to its reporters: "There shall be . . . no production technique which would give the viewer an impression of any fact other than the actual fact, no matter how minor or seemingly inconsequential."²⁰⁶ The ambush interview is just such a technique. It gives the viewer a powerful impression that the interviewee is guilty of wrongdoing when in fact he may be innocent.²⁰⁷ The startled, defensive demeanor of the subject is a principal cause of this impression. Such a reaction, however, is perfectly natural under the circumstances—the subject has just been accosted on the street before a rolling camera, confronted by a reporter without warning. Nevertheless, when seen on television the subject arouses the suspicion of viewers.²⁰⁸

The ambush technique does not discernibly further the goals of press freedom,²⁰⁹ and significantly compromises the privacy interests of subjects.²¹⁰ Depriving the press of the technique would not make it timid or encourage self-censorship.²¹¹ Reporters

201. See Weaver, *supra* note 137, at 85–86.

202. *Id.*; see also Kristol, *supra* note 189, at 26 (arguing that adversary journalism cuts off government's access to press, and thus to public). But cf. Graham, *supra* note 145, at 460–62 (defending an adversary role for the press, and refuting the "access" argument by pointing out how great are the discrepancies between what government says and what it actually does).

203. See *supra* notes 161–77 and accompanying text.

204. See *supra* notes 178–85 and accompanying text.

205. See *supra* notes 186–202 and accompanying text.

206. Daley, *supra* note 5, at 58.

207. See *supra* notes 21 & 118–23 and accompanying text.

208. See *supra* notes 65–68 and accompanying text.

209. See *supra* notes 161–205 and accompanying text.

210. See *supra* notes 150–60 and accompanying text.

211. See *supra* note 35.

would simply be forced to *ask permission* before commencing an interview, rather than catching the interviewee unprepared and unable to present a reasoned response. Indeed, asking the permission of interview subjects is hardly a departure from custom. Interviewing manuals stress the need for "[a] careful self-introduction and orientation about the nature, purpose, and use of the interview."²¹² Special permission is ordinarily obtained for the use of recording equipment,²¹³ and with inexperienced interviewees it is customary for the reporter to establish "ground rules" before starting the interview.²¹⁴

Why would a reporter wish to depart from these customary practices? The answer lies in the original justification for the ambush technique: that if people with something to hide are prepared for an interview, they will merely respond evasively and the truth will not be ascertained.²¹⁵ But ascertaining the truth is precisely what Thomas Jefferson had in mind when he said, "[T]he public judgment will correct false reasonings and opinions, on a full hearing of all parties."²¹⁶ The ambush interview contradicts this fundamental premise by depriving viewers of the opportunity to see both sides of the story, fairly presented, in order to judge for themselves.²¹⁷ If a subject refuses to be interviewed, the reporter is free to say so on the air²¹⁸—which by itself should raise sufficiently ominous questions about the subject's innocence.²¹⁹ But if the subject does decide to face the camera, the goals of both privacy²²⁰ and press freedom²²¹ dictate the same conclusion: that he

212. C. STEWART & W. CASH, *supra* note 71, at 149.

213. *Id.* at 148; *see supra* note 72 and accompanying text.

214. J. BRADY, *supra* note 73, at 96-97; C. STEWART & W. CASH, *supra* note 71, at 148.

215. *See, e.g.*, Carley, *supra* note 11, at 12, col. 5 (quoting Geraldo Rivera).

216. S. PADOVER, THOMAS JEFFERSON AND THE FOUNDATIONS OF AMERICAN FREEDOM 132 (1965) (quoting second inaugural address).

217. *See supra* note 177; *cf.* A. MEIKLEJOHN, *supra* note 138, at 26:

Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*

(emphasis in original).

218. *See supra* note 23.

219. *See* C. STEWART & W. CASH, *supra* note 71, at 152.

220. *See supra* notes 132-36 and accompanying text.

221. *See supra* notes 137-49 and accompanying text.

be given the chance to collect his thoughts, gather his composure, and defend himself as best he can.

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